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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 MARCO DAVIDSON,) Case No. CV 12-4862-JST (JPR)
12)
13 Petitioner,)
14) ORDER TO SHOW CAUSE
15 vs.)
16 KEVIN R. CHAPPELL, Warden,)
17)
18 Respondent.)
19)
20 _____)

21 On June 4, 2012, Petitioner filed a Petition for Writ of
22 Habeas Corpus by a Person in State Custody. The Petition
23 purports to challenge both Petitioner's January 24, 1996
24 conviction in Santa Barbara County Superior Court for assault
25 with a deadly weapon upon a police officer (Penal Code section
26 245(c)), for which Petitioner was sentenced to 35 years to life,
27 and his 1978 conviction in the same court for robbery (Penal Code
28 section 211). Petitioner raises three claims: (1) his sentence
in the 1996 case was illegal under Apprendi v. New Jersey, 530
U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its
progeny; (2) that sentence was unlawful because his 1978
conviction for robbery was used as an aggravating factor, thereby

1 breaching his plea agreement in the earlier case; and (3) his
2 counsel in the 1978 case was ineffective for failing to "inform
3 petitioner in the instructions of the consequences of a life
4 sentence in the event of any future wobbler or felony
5 conviction," and his counsel in the 1996 case was ineffective
6 "when he failed to challenge the unconstitutional application of
7 the three strikes law against the use of petitioner's prior plea
8 agreement" in the 1978 case. Petitioner appears to have
9 exhausted these claims in state court earlier this year.

10 The Petition suffers from numerous deficiencies, among them
11 that Petitioner likely cannot challenge the earlier conviction
12 because he is no longer in custody on it, see Woodall v.
13 Beauchamp, 450 F. App'x 655, 657 (9th Cir. 2011) (habeas
14 petitioner must be in custody on challenged conviction, not for
15 unrelated crime); based on his attachments to the Petition, his
16 plea agreement in the 1978 case does not appear to promise what
17 he claims it did; and his Apprendi claim appears foreclosed by a
18 long line of cases, including Apprendi itself, which exempts
19 prior convictions from its holding, see 530 U.S. at 490. The
20 most obvious flaw, however, is that the Petition on its face
21 appears time barred.

22 Under the Antiterrorism and Effective Death Penalty Act of
23 1996 ("AEDPA"), see 28 U.S.C. § 2244(d):

24 (1) A 1-year period of limitation shall apply to an
25 application for a writ of habeas corpus by a person in
26 custody pursuant to the judgment of a State court. The
27 limitation period shall run from the latest of--

28 (A) the date on which the judgment became

1 final by the conclusion of direct review or the
2 expiration of the time for seeking such review;

3 (B) the date on which the impediment to
4 filing an application created by State action in
5 violation of the Constitution or laws of the United
6 States is removed, if the applicant was prevented
7 from filing by such State action;

8 (C) the date on which the constitutional
9 right asserted was initially recognized by the
10 Supreme Court, if the right has been newly
11 recognized by the Supreme Court and made
12 retroactively applicable to cases on collateral
13 review; or

14 (D) the date on which the factual predicate
15 of the claim or claims presented could have been
16 discovered through the exercise of due diligence.

17 (2) The time during which a properly filed
18 application for State post-conviction or other collateral
19 review with respect to the pertinent judgment or claim is
20 pending shall not be counted toward any period of
21 limitation under this subsection.

22 Although Petitioner's one-year limitation period would
23 normally have begun to run upon the finality of his judgment of
24 conviction, AEDPA extended the limitation period for those whose
25 convictions became final before its enactment to one year after
26 that date - April 24, 1997. United States v. Gamboa, 608 F.3d
27 492, 493 n.1 (9th Cir.), cert. denied, 131 S. Ct. 809 (2010).
28 Petitioner did not file his federal Petition until 15 years

1 later.

2 From the face of the Petition, it does not appear that
3 Petitioner has any basis for contending that he is entitled to a
4 later trigger date under § 2244(d)(1)(B). Petitioner does not
5 contend that he was impeded from filing his Petition by
6 unconstitutional state action. Petitioner seems to contend,
7 however, that he is entitled to a later trigger date under
8 subsections (d)(1)(C) and (D). Subsection (C) does not apply,
9 however, because Petitioner does not rely on any newly recognized
10 right. He cites the U.S. Supreme Court's decisions earlier this
11 year in Lafler v. Cooper, 566 U.S. ___, 132 S. Ct. 1376, 182 L.
12 Ed. 2d 398 (2012), and Missouri v. Frye, 566 U.S. ___, 132 S. Ct.
13 1399, 182 L. Ed. 2d 379 (2012), but neither case involved a newly
14 recognized right; habeas relief has long been available based on
15 ineffective assistance of counsel during plea bargaining.
16 Moreover, neither of those cases involved an untimely petition.
17 Petitioner also seems to claim that a recent Ninth Circuit
18 decision qualifies him for relief under subsection (C), but that
19 subsection is expressly limited to Supreme Court decisions.
20 Finally, the factual bases of his claims have long been known to
21 Petitioner, and therefore he is not entitled to a later trigger
22 date under subsection (D), either.

23 Thus, Petitioner's last day to file his federal habeas
24 petition was April 24, 1997, unless a basis for tolling the
25 statute exists. See Patterson v. Stewart, 251 F.3d 1243, 1246
26 (9th Cir. 2001).

27 No basis for statutory tolling under § 2244(d)(2) appears to
28 exist, as Petitioner's state habeas petitions were apparently

1 filed earlier this year and last. See Ferguson v. Palmateer, 321
2 F.3d 820, 823 (9th Cir. 2003) (holding that § 2244(d) "does not
3 permit the reinitiation of the limitations period that has ended
4 before the state petition was filed," even if state petition
5 was timely filed). In any event, the state court here rejected
6 Petitioner's claims as untimely by citing In re Robbins, 18 Cal.
7 4th 770, 780, 77 Cal. Rptr. 2d 153, 159-60 (1998), and he is not
8 entitled to statutory tolling for that reason as well. See
9 Thorson v. Palmer, 479 F.3d 643, 644-45 (9th Cir. 2007) (holding
10 that citation to Robbins indicates untimeliness and noting that
11 statutory tolling not available for petitions rejected by state
12 court as untimely).

13 Under certain circumstances, a habeas petitioner may be
14 entitled to equitable tolling, see Holland v. Florida, 560 U.S.
15 ___, 130 S. Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010), but only if
16 he shows that (1) he has been pursuing his rights diligently and
17 (2) "some extraordinary circumstance stood in his way," see Pace
18 v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L.
19 Ed. 2d 669 (2005). Petitioner has not even attempted to provide
20 any basis for equitable tolling, and it is hard to imagine a
21 circumstance that could entitle him to 15 years of such tolling.
22 See Doe v. Busby, 661 F.3d 1001, 1015 (9th Cir. 2011) (noting
23 that equitable tolling of 20 years "would be difficult to
24 justify").

25 A district court has the authority to raise the statute of
26 limitations issue sua sponte when untimeliness is obvious on the
27 face of a petition; it may summarily dismiss the petition on that
28 ground pursuant to Rule 4 of the Rules Governing § 2254 Cases in

1 the U.S. District Courts, as long as the court gives the
2 petitioner adequate notice and an opportunity to respond. Herbst
3 v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

4 IT THEREFORE IS ORDERED that on or before July 13,
5 2012, Petitioner show cause in writing, if he has any, why the
6 Court should not dismiss this action with prejudice because it is
7 untimely. If Petitioner intends to rely on the equitable tolling
8 doctrine, he will need to include with his response to the Order
9 to Show Cause a declaration under penalty of perjury stating
10 facts showing that (1) he has been pursuing his rights diligently
11 and (2) "some extraordinary circumstance stood in his way."

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14 DATED: June 14, 2012


JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE